

### § 5.33

the anticipated amount of fees before processing the FOIA request. If the Department can readily anticipate fees for processing only a portion of a request, the Department advises the requester that the anticipated fee is for processing only a portion of the request. When the Department has notified a requester of anticipated fees greater than \$25, the Department does not further process the request until the requester agrees in writing to pay the anticipated total fee.

(d) *Charges for other services.* When the Department chooses as a matter of administrative discretion to provide a special service, such as certification of agency records, it charges the requester the direct cost of providing the service.

(e) *Charging interest.* The Department charges interest on any unpaid bill assessed at the rate provided in 31 U.S.C. 3717. In charging interest, the Department follows the provisions of the Debt Collection Act of 1982, as amended (Pub. L. 97-365), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(f) *Aggregating FOIA requests.* When the Department reasonably believes that a requester, or a group of requesters acting together, is attempting to divide a FOIA request into a series of FOIA requests for the purpose of avoiding or reducing otherwise applicable fees, the Department may aggregate such FOIA requests for the purpose of assessing fees. The Department does not aggregate multiple FOIA requests involving unrelated matters.

(g) *Advance payments.*

(1) For FOIA requests other than those described in paragraphs (g)(2) and (g)(3) of this section, the Department does not require the requester to pay fees in advance.

(2) Where the Department estimates or determines that fees for processing a FOIA request will total more than \$250, it may require the requester to pay the fees in advance, except where the Department receives a satisfactory assurance of full payment from a requester with a history of prompt payment of FOIA fees.

(3) The Department may require a requester who has previously failed to

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pay a properly assessed FOIA fee within 30 calendar days of the billing date to pay in advance the full amount of estimated or actual fees before it further processes a new or pending FOIA request from that requester.

(4) When the Department requires advance payment of estimated or assessed fees, it does not consider the FOIA request received and does not further process the FOIA request until payment is received.

(h) *Tolling.* When necessary for the Department to clarify issues regarding fee assessment with the FOIA requester, the time limit for responding to the FOIA request is tolled until the Department resolves such issues with the requester.

(i) *Other statutory requirements.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

### § 5.33 Requirements for waiver or reduction of fees.

(a) The Department processes a FOIA request for agency records without charge or at a charge less than that established under § 5.32(a) when the Department determines that—

(1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

(b) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(1) of this section, the Department considers the following factors:

(1) Whether the subject of the request specifically concerns identifiable operations or activities of the government.

(2) Whether the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request.

(3) The disclosure's contribution to public understanding of government operations, *i.e.*, the understanding of

the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA request as well as the intention and demonstrated ability to disseminate the information to the public).

(4) The significance of the disclosure's contribution to public understanding of government operations or activities, *i.e.*, the public's understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

(c) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(2) of this section, the Department considers the following factors:

(1) The existence of the requester's commercial interest, *i.e.*, whether the requester has a commercial interest that would be furthered by the requested disclosure.

(2) If a commercial interest is identified, whether the commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) When the fee waiver requirements are met only with respect to a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request.

(e) A requester seeking a waiver or reduction of fees must submit evidence demonstrating that the FOIA request meets all the criteria listed in paragraphs (a) through (c) of this section.

(f) A requester must seek a fee waiver for each FOIA request for which a waiver is sought. The Department does not grant standing fee waivers but considers each fee waiver request independently on its merits.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

## Subpart E—Administrative Review

### § 5.40 Appeals of adverse determinations.

(a) *In general.* A requester may seek an administrative review of an adverse determination on the FOIA request

made by the requester by submitting an appeal of the determination to the Department. Adverse determinations include denials of access to agency records, in whole or in part; "no agency records" responses; and adverse fee decisions, including denials of requests for fee waivers, and all aspects of fee assessments.

(b) *Appeal requirements.* A requester must submit an appeal within 35 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal. The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(c) *Determination on appeal.* (1) The Department makes a written determination on an administrative appeal within 20 working days after receiving the appeal. The time limit may be extended in accordance with § 5.21(c) through (e). The Department's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(2) The Department's determination on an appeal constitutes the Department's final action on the FOIA request. Any Department determination denying an appeal in whole or in part includes the reasons for the denial, including any exemptions asserted under the Act, and notice of the requester's right to seek judicial review of the determination in accordance with 5 U.S.C. 552(a)(4). Where the Department makes a determination to grant an appeal in whole or in part, it processes the FOIA request subject to the appeal in accordance with the determination on appeal.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(6), 20 U.S.C. 3474)